

1 LEONARD PEÑA (State Bar No. 192898)
2 PEÑA & SOMA, APC
3 lpena@penalaw.com
4 402 South Marengo Ave., Suite B
5 Pasadena, California 91101
6 Telephone (626) 396-4000
7 Facsimile (626) 498-8875

8 Attorneys for Defendant
9 Philip Jaurigui

FILED & ENTERED

MAR 18 2022

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY lllewis DEPUTY CLERK

10 **CHANGES MADE BY COURT**

11 UNITED STATES BANKRUPTCY COURT

12 CENTRAL DISTRICT OF CALIFORNIA

13 LOS ANGELES DIVISION

14
15 In re:) Case No.: 2:16-bk-24758 RK
16)
17 SWING HOUSE REHEARSAL AND) Chapter 11
18 RECORDING, INC.,)
19) Jointly Administered with
20 Debtor.)
21 In re) Case No.: 2:16-bk-24760 RK
22)
23 PHILIP JOSEPH JAURIGUI,)
24)
25 Debtor.)
26 JONATHAN MOVER,) Adv. No. 2:18-ap-01351 RK
27)
28 Plaintiff,) ORDER DENYING PLAINTIFF'S
v.) MOTION FOR LEAVE TO FILE FIRST
PHILIP JOSEPH JAURIGUI,) AMENDED COMPLAINT
Defendant.)
SWING HOUSE REHEARSAL AND) Adv. No.: 2-18-ap-01352 RK
RECORDING, INC.,)
Plaintiff,) DATE: March 15, 2022
v.) TIME: 2:30 p.m.
CTRIM: 1675
PHILIP JOSEPH JAURIGUI,) PLACE: 255 E. Temple Street
Defendant.) Los Angeles, CA 90012

1 Plaintiff's Motion For Leave To File First Amended
2 Complaint ("Motion") came before the Court on March 15, 2022,
3 appearances are noted on the Court record, all interested
4 parties having been duly served, the Court having considered all
5 of the papers submitted, along with any arguments of counsel,
6 for the reasons stated on the record at the hearing on the
7 Motion and in the court's tentative ruling on the Motion posted
8 online on the court's website before the hearing (copy attached
9 hereto), and for good cause shown; it is:

10 ORDERED that the Motion is denied.

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25 Date: March 18, 2022
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Robert Kwan
United States Bankruptcy Judge

1 ATTACHMENT – COURT’S TENTATIVE RULING

2 Updated tentative ruling as of 3/15/22:

3 Deny Plaintiff Jonathan Mover’s Motion for Leave to File First Amended Complaint to
4 Conform to Proof. Mover seeks to amend his complaint in Adversary No. 2:18-ap-
5 01351-RK post-trial, over three years after he filed the original complaint, to amend the
6 complaint to add a claim under 11 U.S.C. § 727(a)(7) against Defendant Philip Jaurigui,
7 pursuant to Fed. R. Civ. P. 15(b)(2) (Civil Rule). Although Civil Rule 16 ordinarily binds
8 parties to the terms of the pretrial order and may be modified at trial only to prevent a
manifest injustice, most courts have held that Civil Rule 16 must be read in
consideration of Civil Rule 15(b). See Wright and Miller, *Federal Practice and
Procedure* § 1491.

9 Generally, leave to amend is within the discretion of the court. *Swanson v. U.S. Forest
Serv.*, 87 F.3d 339, 343 (9th Cir. 1996). Factors to consider in allowing an amendment
10 include: (1) bad faith or dilatory motive on the part of the movant, (2) undue delay, (3)
11 undue prejudice to the opposing party by virtue of allowing the amendment, and (4)
12 futility of amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). "Prejudice to the
13 opposing party is the most important factor." *Jackson v. Bank of Hawaii*, 902 F.2d
14 1385, 1387 (9th Cir. 1990). On this record, amending the complaint to add the 11
15 U.S.C. § 727(a)(7) would be unduly prejudicial to defendant because it appears that
16 Plaintiff Mover was aware of the facts that would support his unpled claim under 11
17 U.S.C. § 727(a)(7) before or during trial, the court completed the trial without him
requesting to amend the complaint during trial, and Defendant Jaurigui had no
opportunity to defend against the unpled claim. See *Carter v. National R.P.
Passenger Corp.*, 413 F.Supp.2d 495, 501 (E.D. Pa. 2005).

18 The rule governing amendment of pleadings to conform to the evidence is Civil Rule
19 15(b)(2), made applicable in this adversary proceeding by Fed. R. Bankr. P. 7015
(Bankruptcy Rule), which provides: "When an issue not raised by the pleadings is tried
20 by the parties' express or implied consent, it must be treated in all respects as if raised
in the pleadings. A party may move--at any time, even after judgment--to amend the
21 pleadings to conform them to the evidence and to raise an unpled issue." The plain
22 language of Civil Rule 15(b)(2) specifically refers to an unpled issue being tried by
express or implied consent, and thus consent is a requirement under Civil Rule 15(b)(2)
23 trial of an unpled issue. See *Prieto v. Paul Revere Life Insurance Co.*, 354 F.3d
24 1005, 1012 (9th Cir. 2004). There is no evidence showing that defendant consented to
25 trying the unpled issues raised by a 11 U.S.C. § 727(a)(7) claim, either expressly or
impliedly, as argued by Defendant Jaurigui in his written opposition.

26 Plaintiff Mover does not argue that Defendant Jaurigui consented to trying the
27 unpled claim under 11 U.S.C. § 727(a)(7). Rather, Plaintiff Mover argues that
28 "consent is not a factor because Section 727(a)(7) [by] its very nature is inclusive of the
claims already plead and litigated." Motion at 6. Plaintiff Mover does not cite any

1 authority to support this argument. The Ninth Circuit case cited by the court above,
2 Prieto v. Paul Revere Life Insurance Co., 354 F.3d at 1012, is contrary to Plaintiff
3 Mover's argument.

4 Instead, Plaintiff Mover apparently relies upon a Seventh Circuit decision in *Matter of*
5 *Krehl*, 86 F.3d 737 (7th Cir. 1996) for the proposition that it allowed the addition of a 11
6 U.S.C. § 727(a)(7) claim without consideration of the defendant's consent. Plaintiff
7 Mover misreads *Krehl* because the added claim was under 11 U.S.C. §727(a)(3) rather
8 than 11 U.S.C. §727(a)(7) and the Seventh Circuit held that it did not have to consider
9 the consent issue for the added claim because debtor's discharge was already being
10 denied under other provisions of 11 U.S.C. § 727. Because the Seventh Circuit did not
11 decide whether consent was needed to add another claim under Civil Rule 15(b)(2) and
12 did not specifically address the addition of a 11 U.S.C. § 727(a)(7) claim, the court does
13 not find that *Krehl* is instructive here.

14 "Implied consent is not established merely because one party introduced evidence
15 relevant to an unpleaded issue and the opposing party failed to object to its introduction.
16 It must appear that the parties understood the evidence to be aimed at the unpleaded
17 issue." *Kehoe Component Sales Inc. v. Best Lighting Products, Inc.*, 796 F.3d 576, 595
18 (6th Cir. 2015) (citation omitted). "Otherwise, the court runs the risk of violating the
19 defendant's procedural due process rights by imposing judgment upon a claim against
20 which the defendant did not know he had to defend himself." *Id.* "To establish implied
21 consent, the [plaintiff] must demonstrate that [the defendant] understood evidence had
22 been introduced to prove [the new issue], and that [the new issue] had been directly
23 addressed, not merely inferentially raised by incidental evidence." *In re Acequia, Inc.*,
24 34 F.3d 800, 814 (9th Cir. 1994) (citation omitted). Plaintiff Mover has failed to make
25 this showing in his moving and reply papers as to his proposed 11 U.S.C. § 727(a)(7)
26 claim.

27 Appearances are required on 3/15/22, but counsel and self-represented parties must
28 appear through Zoom for Government in accordance with the court's remote
appearance instructions.